Public Prosecutor v Chang Han Yuan

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41–43 OF 1999

AUGUSTINE PAUL J

1 SEPTEMBER 1999

Criminal Procedure *— Jurisdiction of court — Sessions court — Offences under Women and Girls Protection Act 1973 — Whether sessions court conferred exclusive jurisdiction to hear such offences*

Statutory Interpretation *— Construction of statutes — Exclusion of jurisdiction of courts — Rules of construction — Whether such exclusion to be readily inferred — Whether exclusion to be explicitly expressed or clearly implied — Whether clear and unambiguous words needed to oust jurisdiction*

Statutory Interpretation *— Construction of statutes — Section 31(1) of Women and Girls Protection Act 1973 — Phrase '... a Sessions Court in West Malaysia ... shall have jurisdiction to try an offence ...', interpretation of — Reasons for enactment of the section — Whether section now rendered otiose*

Words and Phrases *— 'Shall' — Women and Girls Protection Act 1973, s 31 — Whether refers to the imperative nature in relation to the exercise of jurisdiction*

The respondent pleaded guilty to an offence under s 16(1)(k) of the Women and Girls Protection Act 1973 ('the Act') in the Magistrates' Court at Kuala Lumpur. He was convicted and sentenced by the learned magistrate to a fine of RM3,000 in default three months' imprisonment. The public prosecutor appealed against sentence. At the hearing of the appeal, the learned High Court judge, exercising powers of revision, invited the parties to submit on the construction of s 31(1) of the Act. The learned judge was prompted to exercise such powers as his attention had been drawn to a daily newspaper report. It was reported therein that the Penang High Court had in a recent case decided that s 31(1) of the Act conferred exclusive jurisdiction on the sessions court to hear and dispose of cases under the Act (see *Lee Ngak Piew v PP* [1999] 4 MLJ 79). The deputy public prosecutor submitted that s 31(1) of the Act was not exclusive in nature and did not oust the jurisdiction of the magistrates' court. Counsel for the respondent however submitted that s 31(1) of the Act was indeed exclusive in nature and only conferred a sessions court with such jurisdiction. The learned High Court judge at Kuala Lumpur had therefore to consider the scope and effect of the phrase '... a Sessions Court in West Malaysia ... shall have jurisdiction to try an offence ...' ('the phrase').

Held, deciding that s 31(1) of the Act is permissive and enhancing the fine to RM5,000 upon considering the merits of the appeal:

(1) The fundamental rule of construction is that the exclusion of jurisdiction of courts is not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied. This rule of construction is not limited to civil courts alone but applies to all courts of general application including criminal courts. The rule against exclusion of jurisdiction of courts applies only where two or more reasonably possible constructions are open on the language of the statute and not where the legislative intent is plain and manifest to oust the jurisdiction. On the facts, there was an absence of clear and unambiguous words in s 31(1) of the Act and thus no legislative intent to oust the jurisdiction of the magistrates' court to try offences under the Act. The explanatory statement in the Bill to the Act further showed that the jurisdiction conferred on the sessions court was intended to be permissive in that the sessions court was not to have exclusive jurisdiction to try offences under the Act and the magistrates' court not deprived of jurisdiction (see pp 54H–55F).

(2) The word 'shall' in the phrase only means that when an offence under the Act is filed in the sessions court, it is imperative for the sessions court to exercise the jurisdiction. The use of the word 'shall' in the phrase therefore refers to the imperative nature in relation to the exercise of the jurisdiction and not to its exclusivity in confining the jurisdiction to a sessions court. Even if the word 'may' had been used in the phrase, a similar construction would apply since it is recognized that where there is an authority to exercise jurisdiction, that power must be exercised even though expressed in discretionary terms (see p 55F–H).

(3) When the Act was enacted in 1973, one of the objectives of the Act was to enhance the penalties for offences under it. However, the sentencing jurisdiction of the magistrates' court was then limited and the magistrates' court could not then impose the full punishment provided under the Act in appropriate cases. The jurisdiction of the sessions court on the other hand was wider. Thus, Parliament enacted s 31(1) of the Act to confer the additional jurisdiction on the sessions court with power to impose the full punishment under the Act so as to achieve the objective of the Act. Presently, with the increase in the jurisdiction of the magistrates' court, s 31(1) has become otiose (see pp 56F–57B).

[Bahasa Malaysia summary

Penentang telah mengaku salah untuk kesalahan di bawah s 16(1)(k) Akta Perlindungan Wanita dan Gadis 1973 ('Akta tersebut') di Mahkamah Majistret di Kuala Lumpur. Beliau disabit dan dihukumkan oleh majistret yang bijaksana dengan denda sebanyak RM3,000 sekira ingkar tiga bulan penjara. Pendakwa Raya telah membuat rayuan terhadap hukuman itu. Di perbicaraan rayuan itu, hakim Mahkamah Tinggi yang arif, melaksanakan kuasa-kuasa

penyemakan, mempelawa pihak-pihak tersebut untuk menghujahkan penafsiran s 31(1) Akta tersebut. Hakim yang arif itu telah dengan segera melaksanakan kuasa-kuasa sedemikian disebabkan oleh perhatian beliau yang tertarik kepada satu laporan akhbar harian. Ia telah dilaporkan bahawa Mahkamah Tinggi Pulau Pinang telah di dalam satu kes yang diputuskan baru-baru ini bahawa s 31(1) Akta tersebut memberikan bidang kuasa eksklusif kepada mahkamah sesyen untuk mendengar dan menyelesaikan kes-kes di bawah Akta tersebut (lihat kes *Lee Nyak Piew v Public Prosecutor* [1999] 4 MLJ 79). Timbalan Pendakwa Raya telah menghujahkan bahawa s 31(1) Akta tersebut tidak bersifat eksklusif dan tidak menyingkir bidang kuasa mahkamah majistret. Peguam bagi pihak penentang walau bagaimanapun telah menghujahkan bahawa s 31(1) Akta tersebut sememangnya bersifat eksklusif dan hanya memberikan mahkamah sesyen bidang kuasa sedemikian. Hakim Mahkamah Tinggi di Kuala Lumpur yang arif oleh itu telah mengambil kira skop dan kesan frasa '... suatu Mahkamah Sesyen di Semenanjung Malaysia ... hendaklah mempunyai bidang kuasa untuk mendengar suatu kesalahan ...' ('frasa tersebut').

Diputuskan, memutuskan bahawa s 31(1) Akta tersebut adalah permisif dan menambahkan denda kepada RM5,000 setelah mengambil kira merit rayuan tersebut:

(1) Rukun penafsiran yang asas adalah bahawa pengecualian bidang kuasa mahkamah-mahkamah tidak boleh dengan serta merta diinferenskan dan pengecualian demikian mestilah sama ada dinyatakan secara eksplisit atau tersirat dengan jelas. Rukun penafsiran tidak terhad kepada mahkamah-mahkamah sivil sahaja tetapi terpakai kepada semua mahkamah-mahkamah pemakaian umum termasuklah mahkamah-mahkamah jenayah. Rukun terhadap pengecualian bidang kuasa mahkamah-mahkamah hanya terpakai di mana terdapat dua atau lebih penafsiran yang mungkin munasabah yang terbuka kepada bahasa statut dan bukan di mana tujuan badan perundangan adalah jelas dan nyata untuk menyingkir bidang kuasa tersebut. Berdasarkan fakta-fakta ini terdapat ketiadaan perkataan-perkataan yang jelas dan tidak taksa di dalam s 31(1) Akta tersebut dan oleh itu tiada niat badan perundangan untuk menyingkir bidang kuasa mahkamah majistret untuk mendengar kesalahan-kesalahan di bawah Akta tersebut. Penyataan penerangan di dalam Rang Undang-Undang Akta tersebut seterusnya menunjukkan bahawa bidang kuasa yang diberikan kepada mahkamah sesyen bertujuan permisif di mana mahkamah sesyen tidak sepatutnya mempunyai bidang kuasa eksklusif untuk mendengar kesalahan-kesalahan di bawah Akta tersebut dan menyebabkan mahkamah majistret serba kekurangan bidang kuasa tersebut (lihat ms 54H–55F).

(2) Perkataan 'hendaklah' di dalam frasa itu hanya bermaksud bahawa apabila suatu kesalahan di bawah Akta tersebut difailkan

di mahkamah sesyen adalah sangat mustahak untuk mahkamah sesyen melaksanakan bidang kuasa tersebut. Penggunaan perkataan 'hendaklah' di dalam frasa itu oleh demikian merujuk kepada sifat imperatif yang berhubung dengan pelaksanaan bidang kuasa dan bukan kepada sifat eksklusif yang membataskan bidang kuasa tersebut kepada mahkamah sesyen. Walaupun perkataan 'boleh' telah digunakan di dalam frasa itu, penafsiran yang sama akan terpakai memandangkan adalah diakui bahawa di mana terdapat autoriti untuk melaksanakan bidang kuasa maka kuasa itu mesti dilaksanakan walaupun dinyatakan mengikut terma-terma budi bicara (lihat ms 55F–H).

(3) Apabila Akta tersebut digubal pada tahun 1973, salah satu daripada objektif-objektif Akta tersebut adalah untuk menambah penalti-penalti kepada kesalahan-kesalahan di bawahnya. Namun begitu bidang kuasa hukuman mahkamah majistret adalah terhad ketika itu dan mahkamah majistret tidak boleh ketika itu mengenakan hukuman penuh seperti mana yang diperuntukkan di bawah Akta tersebut di dalam kes-kes yang sesuai. Bidang kuasa mahkamah sesyen sebaliknya adalah lebih luas. Justeru itu Parlimen telah menggubal s 31(1) Akta tersebut untuk memberikan bidang kuasa tambahan kepada mahkamah sesyen dengan kuasa untuk mengenakan hukuman penuh di bawah Akta tersebut bagi mencapai objektif Akta tersebut. Pada ketika ini dengan pertambahan di dalam bidang kuasa mahkamah majistret, s 31(1) telah tidak digunakan lagi (lihat ms 56F–57B).]

Notes

For cases on jurisdiction of sessions court, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1786–1793.

For cases on construction of statutes, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1454–1578.

Cases referred to

Bank Negara Malaysia v Gerald Glesphy & Ors [1992] 1 MLJ 151 (refd)

Bhimsen v State of UP AIR 1955 SC 435 (refd)

Kilhota Hollohan (Shri) v M/s Zachilhu AIR 1993 SC 412 (refd)

McGavin, Ex p; Re Berne (1945) 46 SR (NSW) 581 (refd)

Ng Kook Kin v PP [1995] 2 MLJ 35 (refd)

Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors [1959] 3 All ER 1 (refd)

Secretary of State v Mask & Co AIR 1940 PC 105 (refd)

State of MP v Rameshwar Rathod AIR 1990 SC 1849 (refd)

State of West Bengal v Anwar Ali AIR 1952 SC 75 (refd)

United Provinces v Atiqa Begum (1940) FCR 110 (refd)

Legislation referred to

Contracts (Amendment) Act 1976 s 7
Criminal Appeal Act 1912 [NSW] s 5B
Lembaga Kemajuan Ikan Malaysia Act 1971 s 20
Women and Girls Protection Act 1973 ss 16(1)(k), 31(1)

Appeal from: Arrest Case No E 83-264-99 (Magistrates' Court, Kuala Lumpur)

Fatnin bte Yusof (Deputy Public Prosecutor) (Attorney General Chambers) for the appellant.
ML Ooi (*ML Ooi & Associates*) for the respondent.

Augustine Paul J: The accused was charged in the Magistrate's Court at Kuala Lumpur for an offence under s 16(1)(k) of the Women and Girls Protection Act 1973 ('the Act'). The offence is punishable with imprisonment for a term not exceeding five years or to a fine not exceeding RM10,000 or to both such imprisonment and fine. The accused pleaded guilty to the charge and the learned magistrate imposed a fine of RM3,000 in default three months' imprisonment. The Public Prosecutor appealed against the sentence passed.

In the course of the submission of both parties at the hearing of the appeal I invited them, in the exercise of my powers of revision, to submit on the construction of s 31(1) of the Act which reads as follows:

> Notwithstanding the provisions of any written law to the contrary, a Sessions Court in West Malaysia and a Court of a Magistrate of the First Class in Sabah or Sarawak shall have jurisdiction to try an offence under this Act and to award the full punishment for any such offence.

I was prompted to enter into this inquiry by a report in *The Star* newspaper of 31 July 1999 where it was reported that the Penang High Court, in ruling that ' ... it was clear that s 31(1) of the Act provided that in the Peninsula, only a sessions court was vested with the jurisdiction to hear and dispose of cases under the Act', set aside the sentence imposed by the magistrate's court and remitted the case to the sessions court for disposal. Learned counsel for the defence contended that s 31(1) of the Act is exclusive in nature and that only a sessions court has jurisdiction to try offences under the Act. The learned deputy public prosecutor, on the other hand, said that s 31(1) of the Act is not exclusive but merely confers an additional power on the sessions court to try offences under the Act and that the jurisdiction of the magistrate's court is therefore not ousted.

In construing s 31(1) of the Act, I shall first refer to the case of *Ng Kook Kin v PP* [1995] 2 MLJ 35 where s 20 of the Lembaga Kemajuan Ikan Malaysia Act 1971 ('the section') arose for consideration. The section, similar to s 31(1) of the Act, reads as follows:

> Notwithstanding anything to the contrary in any other written law, a Sessions Court in West Malaysia and the Court of a Magistrate of the First Class in East Malaysia, shall have jurisdiction to try any offence under this Act or

> under any rule made thereunder, and to award full punishment for any such offence.

It was held in that case that upon a plain reading of the section only the sessions court is vested with jurisdiction to hear and dispose of cases under the Lembaga Kemajuan Ikan Malaysia Act 1971 as the word 'shall' appearing in the section reflects a measure of mandatoriness and the section empowers only the sessions court to award the full punishment of offences under that Act. This would appear to be the stand taken by the Penang High Court in construing s 31(1) of the Act.

In my opinion a resolution of the problem at hand requires a consideration of the operative words of s 31(1) of the Act, that is to say, '... a Sessions Court in West Malaysia ... shall have jurisdiction to try an offence ... ' ('the phrase'). Does this phrase confer an exclusive jurisdiction on the sessions court to try offences under the Act?

In ratiocinating this issue I can do no better than refer to the judgment of the (then) Supreme Court in *Bank Negara Malaysia v Gerald Glesphy & Ors* [1992] 1 MLJ 151, where the construction of s 7 of the Contracts (Amendment) Act 1976 containing words similar to those in the phrase arose for deliberation. That section reads as follows:

> Notwithstanding anything contained in any written law to the contrary, the Sessions Court and, in the case of Sabah and Sarawak, the Court of a Magistrate of the First Class shall have jurisdiction in all civil proceedings which arise from or relate to a scholarship agreement.

In ruling that the language employed in that section does not say that the jurisdiction is exclusive to the sessions court Harun Hashim SCJ, in writing for the Court, said at p 153:

> But is the jurisdiction exclusive to the sessions court? The plain wording of s 7 does not say so. It merely says 'the Sessions Court ... shall have jurisdiction ... '. It would be different if the word 'only' is added before the words 'the Sessions Court' or by some other expressions like 'to the exclusion of any other Court'. The words, 'Notwithstanding anything contained in any written law to the contrary', in this context, can only refer to s 65 of the Subordinate Courts Act 1948 which limit the civil jurisdiction of the sessions court to claims not exceeding $25,000 before 1976 and $100,000 thereafter. Section 7 is therefore only permissive and not imperative in enhancing the jurisdiction of the sessions court.

The Supreme Court has therefore ruled that the jurisdiction is not exclusive to the sessions courts as such an intention has not been clearly expressed. This is in line with the rule of construction that the exclusion of jurisdiction of courts is not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied (see *Secretary of State v Mask & Co* AIR 1940 PC 105). This rule of construction is not limited to civil courts alone, but applies to all courts of general application including criminal courts (see *Bhimsen v State of UP* AIR 1955 SC 435; *State of West Bengal v Anwar Ali* AIR 1952 SC 75; *State of MP v Rameshwar Rathod* AIR 1990 SC 1849). It is a principle by no means to be whittled down and has been referred to as a 'fundamental rule' (see *Pyx Granite Co Ltd v Ministry of*

A *Housing and Local Government & Ors* [1959] 3 All ER 1). However, the rule against exclusion of jurisdiction of courts like other rules of construction is attracted only where two or more reasonably possible constructions are open on the language of the statute and not where the legislative intent is plain and manifest to oust the jurisdiction (see *Kilhota Hollohan (Shri) v M/s Zachilhu* AIR 1993 SC 412). In this respect I refer to *United Provinces v* B *Atiqa Begum* [1940] FCR 110 where Sir Shah Sulaiman J said:

> The intention of the legislature has to be gathered from the language employed in the Act. For statutes which confer or take away legal rights, whether public or private, or alter the jurisdiction of courts of law, express and unambiguous words are necessary.

C It follows that if s 31(1) of the Act is to be construed so as to confer exclusive jurisdiction on sessions courts to try offences under the Act then clear words to that effect are necessary. There is an absence of such clear and unambiguous words in s 31(1) of the Act just as in s 7 of the Contracts (Amendment) Act 1970 referred to earlier. Thus there is no legislative D intent to oust the jurisdiction of the magistrate's court to try offences under the Act. As a matter of fact the true intention of the legislature in enacting s 31(1) of the Act can be gathered from its explanatory statement in the Bill to the Act which reads as follows:

> Clause 31 provides that offences under this Act *may* be tried by a Sessions Court in West Malaysia or the Court of a Magistrate of the First Class in E Sabah and Sarawak and that prosecution for an offence is to be instituted only with the sanction of the Public Prosecutor. (Emphasis added)

The use of the word 'may' in the Explanatory Statement shows that the jurisdiction conferred on the sessions court is intended to be permissive. It is permissive in the sense that the jurisdiction to try offences under the Act F is not exclusive to the sessions court with the result that the magistrate's court is not deprived of the jurisdiction.

I consider it necessary to analyse the effect of the word 'shall' in the phrase that compelled the Courts in the cases that I have referred to in the early part of the judgment to take the particular stand. In my opinion, the G use of the word 'shall' in the phrase only means that when an offence under the Act is filed in the sessions court it is imperative for the sessions court to exercise the jurisdiction. The use of the word 'may' instead of 'shall' in the phrase may have incongruous results if construed as being permissive. In that event a sessions court may decline to exercise the jurisdiction when required to do so. It is for this reason that it has been recognised that where H there is an authority to exercise jurisdiction that power must be exercised even though expressed in discretionary terms. This is illustrated by the case of *Ex parte McGavin; Re Berne* (1945) 46 SR (NSW) 58. Section 5B of the Criminal Appeal Act 1912 (NSW) provided that:

> A court of quarter sessions may submit any question of law arising on any I appeal coming before it to the Court of Criminal Appeal for determination ...

On the question whether the use of the word 'may' gave a discretion to submit a question of law, Jordan CJ said at pp 60–61:

> The word 'may' is prima facie facultative only; but it was pointed out in *Macdougall v Peterson* (1851) 11 CB 755 at p 773, that 'when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised, to exercise the authority when the case arises, and its exercise is duly applied for by a person interested, and having the right to made the application' ... In my opinion, it is the duty of a chairman of quarter sessions to submit to the Court of Criminal Appeal any question of law which either party to the appeal may raise and ask to be so submitted, unless, in his opinion, the question is so obviously frivolous and baseless that its submission would be an abuse of process'.

The word 'shall' was thus inserted in the phrase to render the exercise of the jurisdiction imperative. Even if the word 'may' had been used a similar construction would have to be given. The use of the word 'shall' in the phrase thus refers to its imperative nature in relation to the exercise of the jurisdiction and not to its exclusivity in confining the jurisdiction to a sessions court. The opening words of s 31(1) of the Act show that this is an additional jurisdiction conferred on a sessions court. If the imperative power was to be exclusive then clear words to that effect ought to have been employed which was not done in this case. It is therefore clear that s 31(1) of the Act is mandatory only in the sense that the sessions court must exercise the jurisdiction when required to do so.

The rationale for conferring this additional jurisdiction on the sessions court can be gathered from another object of the Act as stated in the explanatory statement in the Bill of the Act. It reads as follows:

> *Part IV* describes the various offences under the Act. These in general follow the offences set out in the existing legislations but the maximum penalties for such offences have been greatly enhanced as provided in *Clauses 16, 18, 19, 20 and 21* for it is felt that the penalties provided in the existing legislations are manifestly inadequate.

It will therefore be observed that one of the objects of the Act is to enhance the penalties for offences under it. The reason for enhancing the jurisdiction of sessions courts to try offences under the Act and to award the full punishment can be discerned easily. In 1973 when the Act was passed a magistrate's court had jurisdiction to try offences for which the maximum term of imprisonment did not exceed five years or which were punishable with fine only. However, a magistrate's court could then impose only, inter alia, a maximum of two years' imprisonment and a fine of RM5,000. The jurisdiction of a sessions court was wider. It could try offences for which the maximum term of imprisonment did not exceed ten years or which were punishable with fine only and could then impose, inter alia, a maximum of five years' imprisonment and a fine of RM10,000. As the punishable section of the Act prescribe a maximum term of imprisonment of five years offences under the Act would have fallen within the jurisdiction of the magistrate's court in the absence of a provision like s 31(1) of the Act with the result that the penalty that could be imposed was only a maximum term of imprisonment of two years and a fine of RM5,000. This would have been inconsistent with the objective of the Act. It was to achieve this objective that Parliament had enacted s 31(1) of the Act to confer the additional

jurisdiction on the sessions courts with power to impose the full punishment in appropriate cases. The permissive nature of s 31(1) of the Act as described earlier does not take away the jurisdiction of magistrates' courts to try offences under the Act though the punishment that may be imposed is restricted as I have stated earlier.

Thus, in accordance with the guidelines laid down by the (then) Supreme Court in *Bank Negara Malaysia v Gerald Glesphy & Ors* [1992] 1 MLJ 151. I held that s 31(1) of the Act is permissive and not exclusive in nature in the absence of any clear words to the contrary. I interpolate to add that the present increase in the jurisdiction of magistrates' courts renders s 31(1) of the Act otiose.

I then considered the merits of the appeal based on the submission of both parties. On a consideration of the grounds of judgment of the learned magistrate I agreed that a custodial sentence was not appropriate on the facts of the case though the fine imposed warranted interference. Accordingly, I varied the fine to one of RM5,000.

Appeal dismissed.

Reported by Andrew Christopher Simon